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Originalism and the Rule of the Dead

Joel Alicea
The Catholic University of America, Columbus School of Law

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THE CONSERVATIVE LEGAL MOVEMENT is in the midst of a great debate about its future. For decades, originalism — the theory that the original meaning of the Constitution is binding on today's interpreters — has been the default theory of legal conservatism, and so it remains today. But the struggle within legal conservatism is about the very meaning of originalism, as novel theories have challenged long-standing beliefs about originalism's core philosophical premises.

Since its inception, originalism has insisted on obedience to the past in order to vindicate the sovereignty of the living. It has demanded that today's majorities adhere to the original meaning of the Constitution, recognizing that this is essential if those majorities are to govern themselves. In this, originalism has stood against the all-too-understandable impulse to break free of past constraints and empower the present. It has spurned calls for a "living Constitution," the meaning of which changes to reflect the values of society or of a chosen elite.

The new trend in originalism abandons this heritage. It self-consciously rejects the authority of the past and the duties rightfully imposed by our forebears, elevating instead the will of the present and the ideologies of its theorists. Having internalized the basic assumptions of living constitutionalism, it is but one step away from becoming what has always been considered originalism's intellectual adversary.

If originalism is to avoid collapsing into that which it has always opposed, legal conservatives must begin by remembering why they believe in originalism. They must look to originalism's past in order to preserve its future.

JOEL ALICEA is a lawyer in Washington, D.C.

ORIGINALISM AND THE DEAD HAND

Originalism emerged as a distinct jurisprudential movement in the 1960s and '70s in response to the rulings of the Warren and Burger Courts. It was a time of great upheaval in constitutional law, as the Court leveled old doctrines and raised new ones in their place. Living constitutionalism was ascendant and, in many areas, triumphant. So when then-professor Robert Bork published his seminal article on originalism in 1971, "Neutral Principles and Some First Amendment Problems," one would have been justified in seeing it as an anomaly, nothing more than a curious speed bump on the way to a living-constitutionalist future.

But by 1981, it was clear that originalism represented a new and growing force in American law and politics. By that time, then-justice William Rehnquist had echoed the themes of Bork's 1971 article in an important lecture against living constitutionalism. Harvard professor Raoul Berger had published extensive historical studies on the original meaning of the Constitution. And, perhaps most significantly for originalism's long-term success, the newly elected Reagan administration had adopted originalism as its jurisprudential guide and would soon nominate a wave of originalists to the judiciary. In the span of only a decade, originalism had established itself as a formidable intellectual movement with considerable staying power.

At that point, living constitutionalists began their counterattack in earnest. In 1980, Professor Paul Brest published a thorough critique of originalism entitled "The Misconceived Quest for the Original Understanding," which remains a fixture in the originalism literature to this day. Brest sketched many of the problems, distinctions, and concepts that would become central to the debates over originalism in the decades to come, but he made his most enduring argument only in passing. In discussing whether the original meaning of the Constitution has any legitimate claim to our obedience, Brest argued, "[T]here is no justification for binding the present to the compromises of another age."

With this brief assertion, Brest succinctly captured the essence of what has come to be called the "dead-hand argument." The dead-hand argument, in its simplest form, objects to originalism on the grounds that it requires those living today to obey the dictates of those long-since dead, and it asserts that the dead have no right to rule the living. The dead-hand argument quickly became a mainstay of critiques of

originalism. It is hardly surprising, then, that Professor David Strauss, author of *The Living Constitution*, describes the dead-hand argument as "the most fundamental problem with originalism," invoking Thomas Jefferson's statement, "The earth belongs... to the living." From the 1980s onward, the dead-hand argument has served as a popular weapon against originalism.

Yet, despite its frequent invocation in the originalism debates, the dead-hand argument is not merely an argument against originalism. It is an argument against *written law in general* and against the Constitution in particular, at least insofar as we take it for granted that the Constitution—as it declares itself to be in Article VI—is a species of law. (This is not an uncontested starting point, of course. There are theorists, such as Professor Louis Michael Seidman, who believe that we ought to regard the Constitution as "a work of art, designed to evoke a mood or emotion, rather than as a legal document commanding specific outcomes.")

Perhaps the most basic function of law is to constrain our decision-making; as Aquinas said, by law one is "induced to act or is restrained from acting." All law has this characteristic, but written law has a further characteristic: It is meant to continue in force beyond the moment of its creation. That is the primary reason for committing law to writing.

Implicit in these characteristics of written law is an unavoidable consequence: There will be at least some people whom the written law purports to bind even though they were not members of the polity when the law was enacted. This is true of any form of government, democratic or otherwise, since there are always some members of the polity leaving (through death or emigration) and others entering (through birth or immigration). The legislator who died yesterday rules the baby born today. It follows, then, that any theory of law that chafes at being bound by generations past is a theory that is incompatible with written law. To ask for written laws that only bind those living at the moment of enactment is to ask for a legislative session without end. The possibility of written law depends on accepting as binding the judgments of those who came before us.

These considerations about written law in general have particular force in the context of the American Constitution. The Constitution was not only meant to last beyond the moment of its creation; it was "intended to endure for ages to come," in the words of Chief Justice John

Marshall. As Professor Keith Whittington has argued, constitutional creation is no act of ordinary lawmaking. It is an act of higher lawmaking, the enactment of a law that determines how *all other laws* are to be enacted. When the American people undertook to write a constitution, they hoped to bind not just themselves but their successors generations hence. That is why, as Professor Michael McConnell has observed, arguments that dispute the authority of the dead to bind the living are "fatal to any form of constitutionalism. To whatever extent our present-day decisions are shaped or constrained by the Constitution — however interpreted — we are governed by the dead hand of the past."

The dead-hand argument, then, is no more an argument against originalism than it is an argument against any theory that seeks to interpret — rather than abolish — the Constitution. Nonetheless, there is a deep connection between conservatism and originalism that helps explain why originalists — who have mostly been conservatives — have even greater cause to refute the dead-hand argument.

Originalism and Conservatism

The argument thus far has focused on the incompatibility of the dead-hand argument and written law, the very idea of which depends on the living accepting the judgments of the dead. But this is a kind of negative argument, a *reductio* of sorts that merely refutes the dead-hand argument without providing an affirmative case for accepting the rule of the dead.

The positive case is simply an implication of the negative one: By obeying the dead, the living can demand obedience. As Judge Frank Easterbrook once remarked, "Decisions of yesterday's legislatures... are enforced... because affirming the force of old laws is essential if sitting legislatures are to enjoy the power to make new ones." That is, "[p]eople accept old contracts and old laws because they know that this is the only way to ensure that promises *to them* are kept." We, the living, accept the binding force of laws passed before our time so that *our laws* will be obeyed, both in our own time and beyond.

This dynamic between the living and the dead not only undergirds written law; it is foundational to a proper conception of popular sovereignty under the Constitution. Indeed, it is at the heart of what Whittington has called the dualist conception of democratic theory. Under this framework, "the people" exist in their sovereign capacity only

when they engage in higher lawmaking—the making and amending of the Constitution. This lawmaking is of a higher order, as it sets the rules by which all other laws can be made and sets the limits of what those laws can do. At all other times and for all other lawmaking, ordinary politics is the norm, and in such circumstances, the people do not act as the sovereign—though they retain the power to reassert their sovereignty at any moment through the process of constitutional amendment. This is not to deny, of course, that the people remain the ultimate source of authority in a polity during a time of ordinary politics; it is simply to say that they and their representatives are acting *under* or *subordinate to* the rules that the people established in their sovereign capacity.

This conception of popular sovereignty stems from the same kinds of considerations that uphold written law. In the same way that the dead-hand argument is hostile to any form of written law, saying that the people act in their sovereign capacity in everyday politics is hostile to a written constitution. A constitution is meant to guide and limit ordinary politics, and if ordinary politics were the domain of the people *acting as sovereign*, then every statute would be the equivalent of a constitutional amendment, and the idea of a written constitution would become meaningless. As Marshall wrote in *Marbury v. Madison*:

> To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.

Once it is conceded that the people can act as sovereign in ordinary politics, the distinction between ordinary and higher lawmaking breaks down, and the written constitution becomes a mere placeholder for whatever a passing majority wishes to do.

The philosophical assumptions inherent in this dynamic are deeply conservative. It is by obeying the judgments of our predecessors that we are empowered to make judgments of our own. By our act of submission, we attain self-government. Society is, then, in the truest sense, what Burke described: "[A] partnership not only between those who

are living, but between those who are living, those who are dead, and those who are to be born." We look upon our written laws, to cite Burke again, as "an *entailed inheritance* derived from our forefathers, and to be transmitted to our posterity—as an estate specially belonging to the people."

This relationship between generations involves mutual duties and obligations that exist *simply by virtue of being in society*. There is no moment of decision, no ballot that one fills out to accept these responsibilities. Rather, they inhere in the nature of an ordered society because such societies *require* mutual trust and self-sacrifice. To suggest that each of us should be free to pursue only what we desire without regard for the obligations that society demands of us, on the grounds that we were never given a choice in the matter, is to suggest that society should cease to exist.

These philosophical assumptions underlying written law are the essence of originalism. We must submit to the commands of the dead in order to govern ourselves, and in order to submit, we must understand those commands according to their original meaning. It would be farcical to claim that we are being obedient to a rule if we arrogated to ourselves the power to change the meaning of that rule. It would be tantamount to telling past generations: "We will obey your laws—so long as they mean what we say they mean." The rejection of the dead-hand argument is therefore not just about defending the validity of written law in general; it is about defending originalism's core philosophical assumptions.

Similarly, we see that the argument over the dead-hand of the past is about far more than the viability of originalism. At stake is the idea of written law, of popular sovereignty, and of society as an intergenerational partnership between the living and the dead. To accept the dead-hand argument is to reject all that and to embrace a radically different view of law and society, one that novel strains of originalism are forcing us to consider.

ORIGINALISM THEN AND NOW

Since its modern inception in the 1970s, originalism has undergone several important theoretical shifts occasioned by powerful criticisms. In many ways, this process has been a heartening example of how scholarly discourse should operate. As non-originalists pointed out serious

problems with aspects of early versions of originalism, originalists modified their theory to strengthen and improve it.

One of the most important modifications has been the move away from the original *intentions* of the founders and toward the original *meaning* of the constitutional text. During the 1980s, critics such as Brest, H. Jefferson Powell, Justice William Brennan, and others pointed out that originalism's focus on what the founders intended by particular language in the Constitution ran into difficult theoretical obstacles. For instance, it demands an answer to the question of just whose intentions matter. Is it those who attended the Constitutional Convention, the ratifiers in the state conventions, or the people at large? Moreover, how can we today, two hundred years removed from the founding, discern something as ethereal as the intentions of men whose ways of thinking were so different from our own?

Significantly, around the same time, legal conservatives, led by a pair of federal circuit court judges named Antonin Scalia and Frank Easterbrook, were making similar types of arguments against the way in which federal courts routinely interpreted statutes. This was the beginning of the movement known as textualism. The reigning orthodoxy in the federal judiciary was that courts should enforce congressional intent when applying statutes by relying on the legislative history contained in committee reports, floor debates, and other sources. Textualists argued that what mattered were the *words* of the statute understood in their context, not what Congress might have thought it was doing when it chose those words. The words, not the intentions, were all that we knew had been agreed upon as law.

It was fitting, then, that as a Supreme Court justice, Scalia led the shift away from the original intentions of the founders and toward the original meaning of the words of the Constitution. As Scalia would later say in *A Matter of Interpretation*, "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." In this way, legal conservatism's statutory and constitutional theories were harmonized, and many of the criticisms of the intentionalist version of originalism became inert.

However, this change opened the door to later theoretical developments. Once the focus shifted away from intentions and toward the text, it raised the possibility of interpretations that differed from what the

enactors of the constitutional text intended. New theories flowed into that conceptual space, emphasizing the views of the present over the demands of the past. The center of gravity in originalism slowly moved away from an intergenerational partnership of the dead, the living, and the not-yet born and toward a presentist, individualistic conception of law and society.

Two theorists have been the leading figures in this movement: Georgetown professor Randy Barnett and Yale professor Jack Balkin. Their theories have been the vanguard of this novel originalism, albeit with very different ideological valences, and, if legal conservatism opts for a new vision of originalism, it will be due to the influence of both theorists. Both, therefore, must be discussed if originalism—and legal conservatism—is to avoid the perilous path down which both theories lead.

Randy Barnett and the Individual Sovereign

Of the two theorists, Barnett is the more familiar to legal conservatives. He has been the intellectual force behind the rise of a more libertarian legal conservatism that takes a more expansive view of judicial power than legal conservatives have in the past.

Barnett's theory begins from a quintessentially libertarian premise: a view of popular sovereignty in which sovereignty is located in each individual person. Because each person is a sovereign, no law can command the obedience of the people unless the rights of individuals, as sovereigns, are respected. Barnett believes that the sovereign people can consent to having laws imposed upon them, but, because each person is a sovereign, each person must give consent in order for the laws to have legitimacy. And since such unanimous consent is impossible (though Barnett believes it is possible in small groups, such as neighborhood associations), the authority of the Constitution cannot rest on the consent of the governed.

Therefore, as a kind of second-best option, Barnett proposes that the Constitution can command obedience only insofar as it does not infringe on those inherent rights of each individual sovereign: "After all, if a law has not violated a person's rights (whatever these rights may be), then that person need not consent to it." One might call this the "harmless error" solution to constitutional illegitimacy. To that end, laws are owed obedience if they meet two criteria: They are "(1) *necessary* to protect the rights of others and (2) *proper* insofar as they do not violate the preexisting rights of the persons on whom they are imposed."

Barnett believes that the Constitution, when interpreted according to its original meaning, might meet these criteria. For that reason, he champions the importance of the Constitution's writtenness, which he sees as designed to "lock in" the procedures and rights without which the Constitution would certainly be illegitimate. Therefore, it becomes essential to preserve the original meaning because "any meaning contrary to the original meaning would be to contradict or change the meaning of the text and thereby to undermine the value of writtenness itself."

Notice the acceptance of the dead-hand argument contained in Barnett's theory. Not only does it reject the authority of the dead, it rejects the authority of *the living* unless that authority is premised on affirmative, unanimous consent (with the "harmless error" solution as an alternative means of legitimation). This makes sense given, in Barnett's words, his "individualist conception of popular sovereignty." For Barnett, there is no intergenerational partnership of the living and the dead; there is only the sovereignty of the living individual. Indeed, his description of each individual as a "sovereign" is particularly telling. As Bodin instructs us, "[s]overeignty is the... power vested in a commonwealth," and, therefore, to think of each individual as a sovereign is, in a real sense, to think of each individual as his own commonwealth. This is a dramatic repudiation of the traditional conservative notion that society is man's natural state and that society rightly places duties on each person — the position that serves as the foundation for a regime of written law and the one on which originalism comfortably rests.

Barnett's repudiation of that premise has significant theoretical consequences. At its core, living constitutionalism is about forcing the Constitution to conform to the will of the living, whether "the living" is defined as society at large or a subgroup upon whom the living constitutionalist would confer power. Its fundamental orientation, then, is toward the present. That is why it is so hostile to originalism's demand that the present obey the past. We see that same orientation in Barnett's theory, with its rejection of the authority of the dead and its embrace of the sovereignty of each living individual. And just as the logic of living constitutionalism — like any theory that accepts the dead-hand argument — eventually leads to the cashiering of the Constitution altogether, Barnett's philosophical assumptions leave him but a step away from a libertarian version of living constitutionalism.

The influence of living constitutionalism is evident in what Barnett calls the "presumption of liberty," a legal test that he argues should be applied to all laws. It is perhaps the most well-known aspect of his theory. Barnett would have the federal judiciary subject laws to the two-pronged criteria he outlines for constitutional legitimacy, placing the burden on the government to show that its actions are, as noted, "(1) *necessary* to protect the rights of others and (2) *proper* insofar as they do not violate the preexisting rights of the persons on whom they are imposed." This amounts to a presumption that challenged laws are unconstitutional. Yet, as Barnett himself would concede, the "presumption of liberty" is not itself part of the original meaning of the Constitution. Rather, it is a test that Barnett thinks *implements* the unenumerated rights he believes are located in the Ninth and Fourteenth Amendments. True to his theory's orientation away from the dead, Barnett would grant power to the judiciary that goes beyond the original meaning of the Constitution (the past) in the name of the libertarian individualism that sustains his theory (the present).

Barnett might respond that these concerns are overwrought. He could argue that he reaches the same conclusions that most originalists have for decades, with a few important exceptions, and that his theory has reinvigorated originalism for a new generation of legal conservatives. These would be fair responses. Few scholars have been as prolific in researching the original meaning of various constitutional provisions as Barnett has, and much of his scholarship in this regard would command the agreement of originalists old and new. There is no question that Barnett's contributions to the conservative legal movement are significant, that his commitment to originalism is sincere, and that he has worked in good faith to uncover the original meaning of the Constitution.

But none of this bridges the gap between Barnett's philosophical assumptions and those of his originalist predecessors. Some of the results might be the same, but the starting points are quite different. Those starting points, in turn, lead beyond the boundaries Barnett has placed on his theory. The presumption of liberty is not essential to Barnett's originalism, but it shows the living-constitutionalist implications of his premises. Once the dead-hand argument is accepted, we can clearly see what follows.

JACK BALKIN AND "OUR LAW"

As much as Barnett accepts living-constitutionalist premises, his theory is more recognizably originalist than that of Jack Balkin, a leading figure on the legal left whose recent embrace of originalism has been an important development for originalist scholarship. Balkin, like Barnett, rejects the authority of the past. He hangs the legitimacy of the Constitution on its ability to be "responsive to the public's values." Because the people are sovereign, he continues, "[t]here must be some way for people to express their dissatisfaction with the Constitution-in-practice and demand that courts and the political branches reform, restore, or redeem the law *to make it conform* with what the public believes the Constitution properly should stand for" (emphasis added). This is full-throated living constitutionalism, a claim that the Constitution's legitimacy depends on its consistency with current societal values.

In Balkin's view, the way in which the Constitution keeps up with today's society is through its more "abstract terms and vague clauses." According to Balkin, because the people chose to frame these clauses at a high level of generality, they can be faithfully interpreted only as broad principles that are to be applied in light of changing societal values. Crucially for Balkin, without updating the Constitution through these more general clauses—a process *even he* calls living constitutionalism—the Constitution "will lose [its] democratic legitimacy because the Constitution that it justifies and legitimates cannot be 'our law' for an increasing number of citizens."

At the same time, Balkin believes that where a clause is very specific—such as the requirement that there be two senators from every state—the original meaning will supply all of the interpretive content. Balkin asserts that, if the people choose to accept the Constitution, they must accept the binding force of these "hard-wired" clauses for two reasons: The whole document was the product of an act of popular sovereignty, and the Constitution is a legal document, which can be modified only through legitimate legal means.

Balkin therefore proposes—in a good-faith attempt to implement what he sees as the original meaning of the Constitution—a fusion of living constitutionalism and originalism, which can be somewhat oversimplified as follows: The vague, general clauses are to be read according to changing societal norms, while the more specific, "hard-wired"

clauses are to be read according to their original meaning. According to Balkin, his is not "an argument... against the dead hand of the past in general.... [I]t is an argument against the imposition of a dead hand of the past" to those more general clauses that, in Balkin's view, are properly interpreted as inviting living constitutionalism.

The problem is that Balkin's underlying theory of legitimacy does not permit this response. Having staked the legitimacy of the Constitution on whether it conforms to the views of the living, he has no basis for requiring the living to abide by any of the judgments of the dead, and that is as much true of the so-called "hard-wired" provisions as of the more general ones. The level of generality is irrelevant if the legitimacy of the Constitution depends on its coincidence with current societal values. Many of the Constitution's most specific provisions are its most significant, such as its command that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." But if today's society were clamoring for a parliamentary system, in which executive officers were members of the legislature, the rule-like Ineligibility Clause would stand in the way of making the Constitution "our law," which, according Balkin's theory, would pose a significant threat to the legitimacy of the Constitution.

Balkin might respond that, once the people decide to accept the Constitution, they are required to obey even the "hard-wired" provisions for reasons of popular sovereignty and the rule of law. But, again, if the Constitution's legitimacy depends on its reflection of current societal values, it is irrelevant whether the people approved of the document at some point in the distant past. What matters, under the logic of Balkin's theory of legitimacy, are the demands of the people *now*.

If the Constitution must be "our law" in order to maintain its legitimacy, then there is no principled basis for forbidding the living from changing even the most rule-like provisions of the Constitution to make them suited to modern values. If the Cruel and Unusual Punishments Clause is subject to living constitutionalism, then so is the presidential-age requirement. The dead-hand argument tolerates no other answer.

The Legacy of the Dead Hand

Originalism has long been the conservative legal movement's interpretive theory. There are, no doubt, many reasons why this has been so. Historical contingencies played a major role, and no movement

will be entirely consistent in its motivating theories. Nonetheless, the conservative legal movement's adoption of originalism was no mere happenstance or relationship of convenience. It is, rather, founded on shared philosophical premises: a belief in the value of the past, the duties of the present, and the delicacy of a legal regime founded on both. Originalism, properly understood, has endeavored to preserve—and, where necessary, restore—that regime in the face of relentless scholarly criticism, political attacks, and the ever-present desire to break free from the constraints that prevent us from doing what we will.

That legacy is now imperiled by the rise of novel originalist theories that would, in time, lead legal conservatives into the very errors they have long opposed. Barnett and Balkin look to the history of the Constitution, but originalism is about more than history. They stress the importance of the constitutional text, but originalism is about more than words. By embracing the dead-hand argument, Barnett and Balkin replace originalism's core philosophical assumptions with those of living constitutionalism. To the extent that legal conservatives adopt Barnett and Balkin's views, they adopt premises antithetical to their own.

Legal conservatives would do better to hold fast to the principles that have served them well, to safeguard that which it has been their special duty to defend. They would do better to insist on the rule of the dead.